Filed 8/13/19 In re A.T. CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yuba)

In re A.T. et al., Persons Coming Under the Juvenile Court Law.	
YUBA COUNTY HEALTH AND HUMAN SERVICES DEPARTMENT, Plaintiff and Respondent, v. A.T., Defendant and Appellant.	C088558 (Super. Ct. Nos. JVSQ1600090, JVSQ1600091, JVSQ1600092, JVSQ1600093)

A.T., father of the four minors (father), appeals from the juvenile court's order terminating his parental rights pursuant to Welfare and Institutions Code section 366.26.[1] (§§ 395, 366.26.) He contends the court erred in finding the Indian Child Welfare Act of 1978 (25 U.S.C. § 1912 et seq. (ICWA)) did not apply. We conclude the ICWA inquiry

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[1] Undesignated statutory references are to the Welfare and Institutions Code.

and notices to the tribes were insufficient. We will reverse and remand for limited ICWA proceedings.

FACTUAL AND PROCEDURAL BACKGROUND[2]

On June 17, 2016, the Yuba County Health and Human Services Department (Department) filed dependency petitions on behalf of the four minors, ages 6 years, 4 years, 3 months, and 3 months (minors), pursuant to section 300, subdivision (b), alleging father and mother (parents) failed to protect the minors due to the parents' history of substance abuse. The minors were detained.

Upon inquiry regarding possible Native American heritage, mother stated her grandmother, V.A. (the minors' maternal great-grandmother), was a member of the Blackfoot Indian Tribe[3], and father stated his grandfather (the minors' paternal great-grandfather) was a member of the Choctaw Indian Tribe. Thereafter, mother completed the parental notification of Indian status form (ICWA-020) in which she indicated she was or might be a member of, or eligible for membership in, the Blackfoot Tribe of Oil Trough, Arkansas, and provided the name of the maternal great-grandmother. Father completed the form as well, indicating he was or might be a member of, or eligible for membership in, the Choctaw Tribe, without identifying the relative through which he might have such Indian ancestry.

The Department mailed notices of child custody proceedings for Indian children to the Blackfeet Tribe, the Jena Band of Choctaw Indians, the Choctaw Nation of Oklahoma, the Mississippi Band of Choctaw Indians, the Bureau of Indian Affairs (BIA),

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[2] Because father's sole claim challenges compliance with the ICWA, we limit the background summary to the ICWA-related facts and procedure unless otherwise relevant to the issue on appeal.

[3] Mother spelled the name of the tribe "Blackfoot" in her form. Statements from the tribe spell the name, "Blackfeet."

and the Secretary of the Interior, notifying those entities of the upcoming jurisdiction hearing. The notices identified the names and addresses of each parent, their respective dates and places of birth, and the names and locations of their respective tribes or bands. The notices also contained the names, addresses, birthplaces, and possible tribes (if known) of the maternal and paternal grandparents and the maternal and paternal great-grandparents.

On July 14, 2016, the juvenile court sustained an amended version of the dependency petition.

On July 22, 2016, the Department filed proofs of service regarding ICWA notification to the previously-identified tribes, the BIA, and the Secretary of the Interior.

On July 25, 2016, the Department filed another set of notices of child custody proceedings for Indian children sent to the Blackfeet Tribe, the Jena Band of Choctaw Indians, the Choctaw Nation of Oklahoma, the Mississippi Band of Choctaw Indians, the BIA, and the Secretary of the Interior, notifying those entities of the upcoming disposition hearing. The notices were similar but not identical to the notices previously mailed. The substantive changes reflected in the more recently-filed notices included: omission of the cities of birth for both parents; a new address for father but omission of the former address (provided in the previously-filed notices); change of father's tribal membership or enrollment number to "[u]nknown"; change of the paternal grandmother's last name from "[R.]" to "[u]nknown"; change of the maternal grandfather's birthdate from "1956" to "[u]nknown]"; change of the paternal grandmother's address from, "Amboy, Washington" to "Amboi, Washington"; change of the paternal grandfather's address from "Grants Pass, Oregon" to "Grants Pall, Oregon"; addition of an alias for the paternal great-grandmother; change of the paternal great-grandmother's former address to "[u]nknown"; change of the other paternal great-grandmother's name from "[u]nknown"

to "[R.B.]"; and change of the paternal great-grandfather's name from "[u]nknown" to "[D.T.]."

The Choctaw Nation of Oklahoma sent responses on July 11, 2016, and July 29, 2016, stating that the minors were neither enrolled in, nor eligible for enrollment in, the tribe. The Jena Band of Choctaw Indians sent a similar response on July 25, 2016, as did the Blackfeet Tribe on July 30, 2016.

The disposition report filed on August 1, 2016, reiterated the Department's notification efforts and the responses of the respective tribes, and recommended a finding the ICWA does not apply.

On August 3, 2016, the paternal grandmother filed a relative information form that provided her name, address, and telephone number.

At the disposition hearing on August 4, 2016, both parents and the paternal grandmother were present. The court found the ICWA did not apply, declared the minors dependents of the juvenile court and ordered them removed from the parents' custody, ordered reunification services for both parents, and ordered that the paternal grandparents have monthly visitation. There was no further discussion about, and no objection to, the court's ICWA finding. Proof of service of the return receipts signed by the respective tribal representatives was filed on August 4, 2016.

Thereafter, and throughout the remainder of the dependency proceedings, no further ICWA discussions were had, and no ICWA issues raised, by any party or by the court.

The juvenile court terminated parental rights at the section 366.26 hearing on November 7, 2018.

Father filed a timely notice of appeal.

DISCUSSION

Father contends the juvenile court and the Department failed their continuing duty of ICWA inquiry despite the availability of information ascertainable by the Department

with reasonable diligence. He claims the information contained in some or all of the ICWA notices regarding the minors' relatives was deficient because it lacked the following "necessary" information: the parents' former addresses; the parents' towns of birth; the maiden, married, or former names of the maternal and paternal grandmothers; the current addresses of the maternal and paternal grandparents; the former addresses of the maternal grandfather and the paternal grandparents; the birthdates of the maternal and paternal grandparents; the birthplaces of the maternal grandfather and the paternal grandparents; and sufficient information regarding the maternal and paternal great-grandparents.

The Department argues the juvenile court's ICWA finding was based on all information known to the Department, which information was included in the reports and entered into evidence without objection. The Department further argues it complied with the ICWA's inquiry requirements and was not required to know the parents or their relatives had additional information that had not already been provided and, in any event, any failure of ICWA notice was harmless error.

To the extent the Department argues father forfeited his ICWA claim by failing to object to reports or to the juvenile court's August 4, 2016 finding the ICWA did not apply, the Department is wrong. Because the primary purpose of the ICWA is to benefit the tribes, a parent does not forfeit a claim of ICWA notice violation by failing to raise it in the juvenile court. (*In re J.T.* (2007) 154 Cal.App.4th 986, 991; *Nicole K. v. Superior Court* (2007) 146 Cal.App.4th 779, 783, fn. 1.) In any event, as we explain, the record demonstrates the ICWA inquiry and notice here was either incomplete or inadequate or both.

"The juvenile court and social services agencies have an affirmative duty to inquire at the outset of the proceedings whether a child who is subject to the proceedings is, or may be, an Indian child. [Citation.]" (*In re K.M.* (2009) 172 Cal.App.4th 115, 118-119.) When the juvenile court knows or has reason to know that a child involved in a

dependency proceeding is an Indian child, the ICWA requires that notice of the proceedings be given to any federally recognized Indian tribe of which the child might be a member or eligible for membership. (25 U.S.C. §§ 1903(8), 1912(a); *In re Robert A.* (2007) 147 Cal.App.4th 982, 989.) "At that point, the social worker is required, as soon as practicable, to interview the child's parents, extended family members, the Indian custodian, if any, and any other person who can reasonably be expected to have information concerning the child's membership status or eligibility." (*In re Michael V.* (2016) 3 Cal.App.5th 225, 233; see Cal. Rules of Court, rule 5.481(a)(4)(A).)

ICWA notice must include all of the following information, if known: the child's name, birthplace, and birth date; the name of the tribe in which the child is enrolled or may be eligible for membership; names and addresses (including former addresses) of the child's parents, grandparents, and great-grandparents, and other identifying information; and a copy of the dependency petition. (§ 224.3, subd. (a)(5)(A)–(H); *In re D.W.* (2011) 193 Cal.App.4th 413, 417; *In re Mary G.* (2007) 151 Cal.App.4th 184, 209.)

Here, both parents indicated they had Indian ancestry and, on June 15, 2016, provided the Department with information that the maternal grandmother was a member of the Blackfoot Tribe and the paternal grandfather was a member of the Choctaw Indian Tribe. Both parents completed ICWA-020 forms that same day. Mother provided additional information identifying the Blackfoot Tribe of Oil Trough, Arkansas, and providing the maternal grandmother's name. Thereafter, the Department sent notices to various tribes containing the information provided by the parents, along with additional information regarding the maternal and paternal grandparents.

The August 4, 2016 disposition report provides the only detail regarding the efforts taken by the Department to inquire about possible Indian heritage. That report, however, merely reiterates what mother and father initially told the social worker on June 15, 2016, and what information the parents provided in their ICWA-020 forms. It contains no information regarding any other efforts made by the Department to obtain

more information from the parents or any information from any of the relatives. The only ICWA discussion at the August 4, 2016 disposition hearing (at which both parents and the paternal grandmother were present) was the Department's comment that it had received "the last ICWA denial letter on July 29th from the Choctaw Nation," followed by the court's response, "This is a non-ICWA case, is that the finding?" to which the Department replied, "Yes, Your Honor."

While the Department sent notices that included a fair amount of information that was initially provided by the parents, there is no evidence the Department made any additional efforts to obtain information from either parent and no indication it made any inquiry of the paternal grandmother or any other relative, despite the fact the parents and the paternal grandmother were present during various hearings throughout the proceedings and the parents provided at least some identifying information regarding other relatives. Section 224.2, subdivision (a), imposes "an affirmative and continuing duty to inquire" whether a child is or may be an Indian child. Continuing inquiry was particularly important here, where father and mother indicated their potential Indian ancestry was through the paternal grandfather and the maternal great-grandmother, respectively, but little information about those two relatives was initially provided by the parents. "It is essential to provide the Indian tribe with all available information about the child's ancestors, especially the one with the alleged Indian heritage. [Citation.] Notice to the tribe must include available information about the maternal and paternal grandparents and great-grandparents, including maiden, married and former names or aliases; birthdates; place of birth and death; current and former addresses; tribal enrollment numbers; and other identifying data. [Citation.]" (*In re Francisco W.* (2006) 139 Cal.App.4th 695, 703; accord *In re Louis S.* (2004) 117 Cal.App.4th 622, 631 ["The Agency must provide all known information to the tribe, particularly that of the person with the alleged Indian heritage"]; *In re J.M.* (2012) 206 Cal.App.4th 375, 381.)

Here, the notices failed to include sufficient information regarding the paternal grandfather and the maternal great-grandmother, among other relatives, that would allow the tribes or the BIA to determine the minors' membership or eligibility for membership. Further, the two sets of notices contained conflicting information and, in some cases, information that was apparently just wrong (e.g., changing the paternal grandfather's address to "Grants Pall, Oregon"). The defects persisted even though the Department could easily have inquired further of the parents, or contacted or attempted to contact the paternal grandmother and other identified relatives for additional pertinent information. Unfortunately, the extent, if any, to which the Department attempted to obtain more information from the parents, or to obtain any information from the paternal grandmother or any other relative, cannot be ascertained from this record.

As for the Department's argument that any failure of ICWA compliance is harmless error, we cannot say with certainty the notices were legally sufficient or that there was no prejudice to the relevant tribes. "[E]rrors in an ICWA notice are subject to review under a harmless error analysis. [Citation.]" (*In re Brandon T.* (2008) 164 Cal.App.4th 1400, 1415.) If we conclude the juvenile court did not comply with the ICWA provisions, we "reverse only if the error is prejudicial." (*In re A.L.* (2015) 243 Cal.App.4th 628, 639.) Error is not presumed. It is father's obligation to present a record that affirmatively demonstrates error. (*In re D.W., supra,* 193 Cal.App.4th at pp. 417-418.) Father has done so here. In the absence of evidence of the Department's efforts to fulfill its continuing duty of inquiry, we cannot say the failure of ICWA compliance was harmless. Therefore, we must remand for limited ICWA proceedings.[4]

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[4] Given our decision to remand for further ICWA proceedings based on the appellate record before us, we deny father's motion to consider additional evidence on appeal filed April 11, 2019 and ordered deferred by this court pending calendaring and assignment of the panel on May 23, 2019.

DISPOSITION

The juvenile court's order terminating parental rights is reversed and the matter is remanded to the juvenile court for limited proceedings to determine compliance under the Indian Child Welfare Act of 1978 (25 U.S.C. § 1912 et seq.). If, at the conclusion of those proceedings, no tribe indicates any one of the minors is an Indian child within the meaning of the Indian Child Welfare Act, then the juvenile court shall reinstate the order terminating parental rights. In all other respects, the judgment is affirmed.

/s/
HOCH, J.

We concur:

/s/
RAYE, P. J.

/s/
MAURO, J.